Supreme Court of the United States.

OCTOBER TERM, 1897.

No. 167.

THE COMMISSIONERS OF THE SINKING FUND OF LOGAN COUNTY AND THE COUNTY OF LOGAN, KENTUCKY, *Appellants,*

v.

THE UNITED STATES.

Appellants' Brief in Reply.

As to the facts in the Case.

There is a difference between the counsel for the government and ourselves as to the facts in this case. Fortunately the Court of Claims has made certain findings which are reasonably clear and explicit. Some things may have been omitted which the parties might desire should be stated; but enough is furnished to enable the court to form an intelligent opinion and draw the proper legal conclusions.

The counsel for appellees seem not to be satisfied with the record. They charge the court below with having introduced into its findings of fact "irrelevant" matter —matter that has no business in the case. They contend (page 8) that all of the fifth finding should be disregarded. They also contend (page 9) that other parts of the find-

ing were inserted "through inadvertance." They further contend (page 10) that the court below "did not consider the language used as carefully" as it should have done. They also contend that still other portions of the finding of fact are mere conclusions of law. Having thus eliminated or attempted to eliminate from the case all the "irrelevant" matter—all the facts which were inserted "inadvertantly"—all the facts which are not properly stated and all the facts which are denominated conclusions of law, they proceed to give their interpretation of the parts which remain.

They deny that the "surplus" fund was ever distributed in the form of a stock dividend and charge (page 11) that "there is absolutely nothing in the record from one end to the other" to warrant that statement upon our part. They deny that the surplus was ever converted into a stock dividend at all, and they claim that if any stock dividend was ever issued to the City of Louisville and the County of Logan, it was not diminished by the taking out of any tax.

Upon these points we take issue with the learned counsel.

We assert—

That the surplus *was* converted into a stock dividend; that it was distributed to the stockholders in the form of a stock dividend; that the dividend included the tax and that the tax was taken out of the dividend by the company and the stock received by Louisville and Logan County was diminished to that extent.

However much the finding of fact may be criticised by the counsel for the government, we feel justified in assuming that the court below understood and performed its duty and that it intelligently and accurately stated the facts of the case. We shall therefore assume that they are correct and will rely solely upon what appears in the record.

1. Surplus—stock dividend and tax.

Our contention that the surplus was converted into a stock dividend, and that the tax was taken out of it, and that the stockholders received the stock diminished by the amount of the tax is supported by the Commissioner of Internal Revenue in his letter to the Secretary of the Treasury and by the Secretary of the Treasury in his letter approving the allowance of the claim (R., pp. 4 and 5). It is also established by the fifth finding of fact (page 9) made by the Court of Claims, wherein it is stated that the surplus was converted into a stock dividend and a tax assessed and collected upon it and it is also established by the second finding of fact (page 8), wherein the amount of the surplus, the amount of the tax and the amount of the dividend are fully set forth.

The Commissioner of the Internal Revenue and Secretary of the Treasury were the only persons authorized by Congress to adjudicate the claim and their findings of fact must be accepted as correct. And when as in the present case, the Commissioner and Secretary are corroborated and supported as to the facts, by the Court of Claims itself, there ought to be an end of controversy.

2. Form of tax return.

We incorporated in our brief (page 15) one of the returns made by the Louisville and Nashville Railroad Company to show that the dividend included the tax and that the stockholder received it diminished by the amount of the tax. The copy of the return is taken from the first finding of fact by the court (page 7).

The learned counsel for the government contend that the table given, refers to cash, and not to stock dividends.

The company was required to make returns both of its cash and stock dividends, and the form given applies to

both classes alike. It is furnished by the court as a sample and the court (page 7) expressly says:

"The following is *one* of the returns made by the railroad company and *all* were in substantially the same form."

That this form was used in the case of stock as well as cash dividends is clearly shown by the second and fifth findings of fact.

3. The forty per cent. stock dividend.

The forty per cent. stock dividend which was declared in 1867 included the five per cent. tax, and the City of Louisville and the County of Logan received only ninety-five per cent. of their share of that dividend—the other five per cent. being retained by the company to pay the tax. The tax was therefore "deducted" from the stock dividend and the transaction was brought within the letter and spirit of the act of 1893. The city and county received their stock diminished by the amount of the tax. This is shown by the last part of the second finding of fact (page 8) which reads as follows:

"At the time when the stock dividend was declared—November 16, 1867—the nominal or par value of the capital stock of the Louisville and Nashville Railroad Company was $5,638,600.

The surplus earnings of the road reported by the officers thereof to the Internal Revenue Department, prior to the year 1868, on which the road paid a tax of five per cent.—

Amounted in the aggregate to	$2,461,787 17
Tax paid thereon	123,089 36
	$2,338,697 81

The par value of the stock dividend in 1867 was $2,131,500."

It will be seen that the company had a surplus sufficient to warrant the declaration of a forty per cent. dividend and a little over. It declared the dividend.

A forty per cent. dividend on $5,638,600 amounted to $2,255,440.

This was the amount the stockholders would have received if there had been no tax. As a matter of fact, however, they received only $2,131,500. This is ninety-five per cent. of the amount of the dividend; the remainder being taken out for taxes.

In every instance the dividend declared included the tax, and the city of Louisville and the County of Logan as well as all the other stockholders received their stock diminished by the amount of the tax.

To avoid the force of this position counsel contend that more than five per cent. was reserved by the company. The only effect of this contention is to show that Logan County got even less than ninety-five per cent. of the dividend. However this may be, the undoubted purpose was to reserve from the dividend five per cent. for taxes. They did reserve at least that amount and the fact remains that the revenues of Logan County were diminished to that extent.

The forty per cent. issued to be paid in stock was just as much a dividend as though declared to be paid in cash, and when the act of 1893 directed the Commissioner and Secretary to refund the amount deducted from dividends, it clearly included the sums taken out of the stock dividends as well as those taken out of the cash dividends. They found that $5,864.21 had been deducted from the stock dividend due and payable to Logan County. The fact can not be questioned, and the county has the undoubted right to recover it back.

4. The Fifth Finding of Fact.

The fifth finding of fact emphasizes and fortifies our position and is very valuable in aiding us to arrive at the facts and the law of the case.

Counsel contend that this finding is irrelevant and has nothing to do with the present case, for the reason that the facts therein stated apply to case No. 105, The United States *v.* The City of Louisville. A little reflection will show that the fifth finding *does* apply to both cases.

The seventeen thousand dollar claim involved in the Louisville case arose out of the forty per cent. dividend declared in 1867. The five thousand dollar claim involved in the present case arose out of the same dividend. The facts are exactly the same in each case. By looking at the fourth finding of fact (page 9) it will be seen that the Logan County claim is particularly stated. And then, having done this, the court in its introduction to the fifth finding declares that "prior to the passage of the act of 25th of February, 1893, the following proceedings had taken place in the Treasury Department relative *to the same taxes paid by the same company.*" By this the court clearly intends to set forth that the case of Logan County in this respect is exactly like that of Louisville. Hence the importance and propriety of the finding.

We therefore submit that the Court of Claims for this and other reasons, committed error in refusing to render judgment for the amount of taxes which had been deducted from the stock dividend payable to Logan County.

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of Counsel.